17-691

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 172.

THE PARKERSBURG AND OHIO RIVER TRANSPORTATION COMPANY, APPELLANT,

vs.

THE CITY OF PARKERSBURG, THOMAS MURPHY, RECORDER, AND GEORGE B. NEAL, WHARFMASTER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED JANUARY 29, 1880.

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INDEX.

	Original.	Print.
Citation	1	1
Bond	2	1
Order granting leave to file bill for subpœna and temporary injunction	6	2
Bill of complaint	8	3
Exhibit A, city ordinance	23	9
B, summons	26	11
C, summons	27	11
E, itemized account of wharfage	28	11
Order continuing injunction	29	12
Demurrer	29	12
Final decree	32	13
Writ of error prayed and allowed, &c	33	14
Bond	34	14
Clerk's certificate	36	15
Appeal allowed	37	15

1 THE UNITED STATES OF AMERICA, *ss:*

To The City of Parkersburg, Thomas Murphy, recorder of said city, and George B. Neal, wharfmaster of said city, greeting:

Whereas The Parkersburg and Ohio River Transportation Co. have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the district of West Virginia, made in favor of you, The City of Parkersburg, Thomas Murphy, and George B. Neal, and has filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Washington, D. C., in the fourth circuit, this 21st day of November, in the year of our Lord one thousand eight hundred and seventy-nine.

(Signed) M. R. WAITE,
Chief Justice Sup. C't U. S.

Copy tested:
L. B. DELLICKER,
Clerk C. C. U. S., D. W. Va.

2 The endorsement on the foregoing citation is in words and figures following, to wit:

Legal service of the within writ accepted this 29th day of November, 1879, on behalf of defendants within named.

B. M. AMBLER,
City Solicitor.

Filed November 29, 1879. L. B. Dellicker, clerk.

The bond is in words and figures following, to wit:

Know all men by these presents that we, The Parkersburg and Ohio River Transportation Company and James N. Williamson and E. P. Chancellor, are held and firmly bound unto The City of Parkersburg, Thomas Murphy, recorder of said city, and George B. Neal, wharfmaster of said city, in the full and just sum of three thousand five hundred dollars, to be paid to the said The City of Parkersburg, Thomas Murphy, recorder of said city, and George B. Neal, wharfmaster of said city, their and each of their, certain attorney, executors, administrators, or assigns; to the payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 31st day of October, in the year of
3 our Lord one thousand eight hundred and seventy-nine.

Whereas at a circuit court of the United States for the district of West Virginia, in a suit depending in said court between the said Parkersb'g and Ohio River Transportation Company, complainant, and the said The City of Parkersburg, Thomas Murphy, recorder of said city, and George B. Neal, wharfmaster of said city, defendants, a final decree was rendered against the said complainants. And the said complainant having pro'ecuted an appeal from the said final decree to the Supreme Court of the United States, having obtained said appeal and filed a copy thereof,

and of the record in said cause, in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said The City of Parkersburg, Thomas Murphy, recorder, and George B. Neal, wharfmaster of said city, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such that if the said The Parkersburg and Ohio River Transportation Company shall prose-
4 cute its said appeal to effect, and answer all damages and costs if it fails to make its said plea good, then the above obligation to be void; else to remain in full force and virtue.

PARKERSBURG & OHIO RIVER TRANSPORTATION COMPANY,
By E. P. CHANCELLOR, *Res.* [SEAL.]
JAS. N. WILLIAMSON. [SEAL.]
E. P. CHANCELLOR. [SEAL.]

Sealed and delivered in the presence of—
J. WM. JOHNSIN.

As a bond for costs only approved by—

M. R. WAITE,
Chief Justice U. S.

Filed November 29th, 1879. L. B. Dellicker, clerk.

A copy. Teste—
[SEAL.]

L. B. DELLICKER,
Clerk C. C. U. S., D. of W. Va.

5 In the circuit court of the United States, district of West Virginia.

THE PARKERSBURG AND OHIO RIVER TRANSportation Company, a corporation duly organized and doing business under the laws of the State of West Virginia,
vs.
THE CITY OF PARKERSBURG, THOMAS MURPHY, recorder of said city of Parkersburg, and George B. Neal, wharfmaster of said city.
} In equity.

TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
District of West Virginia, ss:

In the circuit court of the United States for said district, at chambers, at Parkersburg, in said district, August 31st, 1878, before the undersigned, associate judge of said court.

THE PARKERSBURG AND OHIO RIVER TRANSportation Company, plaintiff,
vs.
THE CITY OF PARKERSBURG, THOMAS MURPHY, recorder of said city of Parkersburg, and George B. Neal, wharfmaster of said city, defendants.
} In equity.

6 This day came the said plaintiff, by its counsel, and here exhib-

ited its certain bill of complaint, verified by affidavit, against the said defendants, and prays an injunction to restrain this defendants, their attorneys, agents, and servants, from all further proceedings against said plaintiff and its officers by the several suits now pending or otherwise under and by virtue of an ordinance of the said city of Parkersburg, passed March 17th, 1865, entitled "An ordinance amendatory of an ordinance passed 18th March, 1857, regulating the wharfs of the city and establishing the rates of wharfage," from enforcing any judgement or judgements recovered by the said City of Parkersburg against said plaintiff for the alleged violation of said ordinance, or moneys claimed to be owing thereunder, and from in any way interfering with or abridging the right of the plaintiff to the free use of the Ohio River, by means of its steamboats or otherwise; which said bill having been seen and inspected by the undersigned, leave is given to file the same. And upon the motion of said plaintiff, by counsel, the undersigned doth fix the 24th day of September, 1878, as the time, and the United States court-room in Parkersburg, in the county of Wood, in said district, as the place, for the hearing of said application for said injunction.

7 And upon the further motion of said plaintiff, by its counsel, process of subpœna is awarded it upon said bill against the defendant therein named, returnable at rules to be held in the clerk's office of this court, and also a notification to be served upon said defendant, warning them to be and appear before the judges of the circuit court of the United States for said district at the time and place specified, to show cause why said injunction shall not be granted.

And upon the further motion of the plaintiff, by its counsel, and for reasons appearing to the undersigned, it is further ordered that upon due service of such subpœna in chancery, copy of this order, and notification upon the defendants, they and each of them, their attorneys, agents, and servants shall be and stand, and they hereby are, temporarily enjoined and prohibited from doing all or any of the acts and proceedings above mentioned, this temporary injunction to continue until the said 24th day of September, 1878, and until the hearing and determination of said application for an injunction as aforesaid.

Done and ordered the day and year first above written.

J. J. JACKSON,
Dist. Judge.

AUG. 31ST, 1878.

8 The bill of complaint referred to in the foregoing order is in words and figures following, to wit:

To the honorable the judges of the circuit court of the United States for the district of West Virginia:

The Parkersburg and Ohio River Transportation Company, a corporation duly organized and doing business under the laws of the State of West Virginia, and a citizen of said State, brings this its bill against The City of Parkersburg, a municipal corporation created and existing under the laws of said State, Thomas Murphy, recorder of said city of Parkersburg, and George B. Neal, wharfmaster of said city, all citizens of said State of West Virginia.

And thereupon your orator, The Parkersburg and Ohio River Transportation Company, complains and says: That on the 16th day of April, 1873, your orators became, and still is, a corporation under the general incorporation laws of the State of West Virginia, for the purpose of carrying on a transportation business on the Ohio River (which is a free navigable highway of the United States) and its tributaries, in steamboats, barges, and flat-boats, and also for the purpose of carrying on a general wharf and commission business, at any place where it may be deemed necessary by your orators.

And that under and by the terms of its certificate of incorpora-
9 tion your orator's principal office was located at the city of Parkersburg, Wood County, State of West Virginia, in the district aforesaid, and ever since has remained, and still does remain, thereat.

Your orator further represents that under its said charter or certificate of incorporation it has been for many years past engaged in a general transportation business on the Ohio River and its tributaries, to and from the ports of Pittsburgh, in the State of Pennsylvania; Wheeling and Parkersburg, in the State of West Virginia; Cincinnati, in the State of Ohio, and the city of Covington, in the State of Kentucky, and the intermediate places between said cities on the Ohio River, carrying for hire passengers and freight to and from said points in steamboats generally owned by your orator, and sometimes temporarily procured by it for that purpose; that your orator is now the owner of four steamboats, each one over twenty tons burden, engaged in such trade, for which it has expended many thousands of dollars.

Your orator further represents that the home ports of the steamboats owned by it are in the city of Wheeling, State and district aforesaid, where they are duly enrolled and licensed to carry on a coasting trade on the Ohio River and its tributaries, in conformity with the act of Congress of the United States in relation thereto; but that under the laws of the
10 State of West Virginia the property of your orator has been and is assessed for the purpose of State, county, and municipal taxation in the City of Parkersburg aforesaid, where its principal office is and has been located. And that your orator has regularly and duly paid to the said City of Parkersburg all taxes charged by said city upon your orator's property, including the steamboats owned by it, except the taxes for the year 1875, which your orator has not paid, for the only reason that it is advised and believes it has just and legal offsets to the same.

Your orator further alleges that many years ago the City of Parkersburg caused to be constructed on the banks of the Ohio River, at the foot or termini of Neal, Kanawha, and Ann streets in said city, a wharf or public landing to be used by the various steamboats trading on said river and landing at said city; and that said wharf or public landing is still controlled by said city, under a certain ordinance passed by the mayor and council thereof on the 17th day of March, 1865, entitled "An ordinance amendatory of an ordinance passed 18th March, 1857, regulating the wharfs of the city and establishing the rates of wharfage."

A copy of sections 1 and 5 of said ordinance is herewith filed marked Exhibit A, and prayed by your orator to be taken and read as part of this bill. The said sections are the only portions of said ordinance con-
11 taining or referring to the matters hereinafter complained of in this bill.

Your orator further alleges that under and by virtue of said ordinance the said City of Parkersburg has, ever since the time of organization of your orator, required your orator, its agents and servants, to pay to it the charges provided in said ordinance for all the steamboats owned or controlled by your orator that have discharged or received freight or passengers or landed at its said wharf, which payments have been made by your orator involuntarily, it protesting against the legality and justice of the same and the validity of said ordinance; that your orator made said payments involuntarily and to avoid the continual annoyance of the daily arrest of the commanders of its steamboats, as provided for in section 5 of said ordinance and the compulsory judgment therein prescribed.

Your orator further alleges that, as it is advised and believes, the said ordinance is wholly null and void, and is in conflict with those provisions of the Constitution of the United States relating to the regulations of inter-State commerce and prohibiting any State, without the consent of Congress, from laying any duty of ton'age; and that the operation of the same tends to and does abridge the free use of the Ohio River by your orator, to which it is legally entitled by virtue of the enrollment and
12 license of its steamboats under the laws of the United States as aforesaid. As by reference to said ordinance will appear, the rates of charges made by said City of Parkersburg upon steamboats landing at or in front of the wharf of said city are based upon and regulated solely by the "tons burden" of said boats, and said charges are made indiscriminately, w'ether the boat lands or anchors at or in front of any public landing or wharf of said city. And your orator further avers that the Congress of the United States has never given its consent to the passage or enforcement of said ordinance, but, on the contrary, ton'age duties are expressly prohibited by section 4220 of the Revised Statutes of the United States to be levied upon enrolled or licensed vessels trading from one port in the United States to another port within the same.

Your orator also charges that the rates of wharfage so charged by said city under and by virtue of said ordinance are unreasonable, extortionate, oppressive, and unjust, and are made and levied by said city as a tax upon commerce for the express purpose (under the assumed pretence of wharfage dues) of replenishing its treasury and increasing its revenue, amounting to an illegal interference with the rights of your orator to navigate the Ohio River by means of its steamboats aforesaid; that as your orator is
13 informed and believes the actual cost of constructing said wharf has been collected over and over again by said city by means of the exaction of wharfage dues under said ordinance; that the said city has permitted the said wharf to become and remain in bad repair, at times almost unfit for the purpose for which it was intended, using all or nearly all the wharfage dues collected by it in paying off its public debt and current running expenses, and expending almost absolutely nothing for the repair and maintenance of said wharf, as your orator is informed and believes from a statement made to it by R. H. Stoutenborough, clerk of the council of the city of Parkersburg, and as such custodian of the books and records thereof in the year 1876. The said city collected and received into its treasury from wharfage dues exacted under the ordinance aforesaid, the sum of twenty-seven hundred and forty-four $\frac{37}{100}$ dollars; of this amount four hundred and twelve $\frac{65}{100}$ dollars were paid by said city to its wharf-

master for the collection thereof. Forty-nine $\frac{72}{100}$ dollars were expended by said city for the repairs of its said wharf, and the balance, twenty-two hundred and eighty-two dollars went and was appropriated to increase the revenue of said city. In the year 1877 the said city collected and re-

14 ceived into its treasury from such wharfage dues under said ordinance the sum of two thousand nine hundred and fifteen $\frac{13}{100}$ dollars, of this amount three hundred and sixty-six $\frac{53}{100}$ dollars were paid by said city to its wharfmaster for the collection of the same; twenty-nine $\frac{59}{100}$ dollars were paid by said city for repairs of its said wharf, and the balance thereof, two thousand and three hundred and twenty $\frac{01}{100}$ dollars, went and was appropriated to increase the revenue of said city.

And your orator further alleges that the wharfage charges which have been collected by the said city during the present year, 1878, have been disposed of in the same manner, to wit, to replenish the treasury of said city and increase its revenue, and not to the maintenance or repair of said wharf. These facts and figures are alleged and set forth to show the grossly unjust and extortionate character of said ordinance, and how it has been used for the oppression and to the injury of your orator and others, the owners of steamboats and other craft navigating the Ohio River, which may land at the city of Parkersburg, the same being a port of entry of the United States, in fact the city of Parkersburg, by its mayor and council, has by means of said ordinance established and is maintaining a muni-

15 cipal custom-house on the banks of the Ohio River, within its corporate limits, for the purpose of laying duties and imposts on imports and exports.

And in order to show that the said ordinance was intended and has been executed for the purpose of raising a revenue for said city of Parkersburg, your orator alleges that on the 29th day of October, 1855, the president, recorder, and trustees of the town (now city) of Parkersburg enacted another ordinance entitled "An ordinance to provide for paying the subscription of the town to the capital stock of the North Western Virginia Railroad Company," whereby it was, among other things, provided that the collecting officers of said town shall semi-annually, on the first day of April and October, pay over to the trustees of the loan, made for said subscription by said town to the capital stock of said railroad company, the net proceeds of the wharfage rates after deducting the cost of management and such necessary repairs and improvements of the wharves as may have been authorized or appropriated by the council. That said last named ordinance still remains in full force and effect, and the net proceeds of said wharfage dues paid into its sinking fund are still being applied by said city to the payment of its said subscriptions to said railroad. And

16 your orator further *further* alleges that if for no other reason the said pretended ordinance is invalid, because it is unreasonable and contrary to common right and justice. And that the same is not a police regulation of said city, or an inspection law authorized by the State of West Virginia, but a measure adopted and enforced for the benefit and increase of its revenue.

Your orator further alleges, as it is advised and believes, the said ordinance cannot, under the laws of the State of West Virginia, be enforced legally against your orator, because the laws of said State provide that when the capital of a corporation formed under the laws is assessed at the

place where it has its principal office, "the personal property thereof shall not be otherwise assessed." That your orator's said steamboats are assessed and taxes paid thereon to said city of Parkersburg, although said steamboats are not located there, making only temporary landings, and yet when said temporary landings are made the said city, under said ordinance, seeks, in violation of the express language of the statutes of the State, to impose another charge or assessment for the same. Such an attempt, as your orator is advised and believes, is obnoxious also to the objection of double taxation, whereby your orator's property is taxed because its principal
17 office is in the said city of Parkersburg, and then charged, assessed, and taxed over again when it visits the home of its original taxation.

Your orators further alleges that having within a few days last past refused any longer to submit to the illegal exaction demanded by said city under said ordinance to pay the wharfage charges on its steamboats landing at said wharf, as required by the same, one Thomas Murphy, recorder of the city of Parkersburg, did, upon the 21st day of August, 1878, upon the complaint of George B. Neal, the wharfmaster of said city, issue a summons or warrant against your orator for the recovery of the sum of nine dollars, wharfage charges claimed to be due from your orator to said city, returnable on the 22d day of August, 1878; which said summons or warrant was served upon the president of your orator. The attested copy of said summons or warrant so served upon your orator's president is herewith filed, marked Exhibit B, and prayed to be taken and read as part of this bill.

Your orator further alleges that upon the return day of said summons or warrant, your orator appeared before said recorder, by its president and attorney, and objected to a judgement being rendered against it thereon, upon the ground hereinbefore alleged of the unconstitutionality and
18 invalidity of said ordinance, but the said recorder, notwithstanding the defence so made by your orator, and in defiance of its rights, rendered judgement against your orator for the said sum of nine dollars and costs of suit, and now threatens to enforce said judgement by an execution against the property of your orator. Said suit was claimed by said city to be instituted under the 5th section of said ordinance, which, by inspection, will be seen to make it the duty of the wharfmaster to recover the amount of wharfage, and on the refusal to pay the wharfage due after the first twenty-four hours to institute like proceedings and recover from day to day the amount of wharfage which may become due under said ordinance.

Your orator further represents that at the trial of said suit George B. Neal, the wharfmaster of the said city of Parkersburg, was present, and that it was then and there stated by him and said Thomas Murphy that if your orator continued to refuse to pay wharfage dues under the provisions of said ordinance they would be compelled to enforce the provisions of said section 5 thereof.

Your orator further represents that its steamboats, in the regular course of their business, are now making landings almost every day at the wharf aforesaid, and that if said ordinance is permitted to be enforced your orator will either be compelled to cease doing business at said city
19 or to yield to its extortionate and illegal demands unless protected by your honorable court. And your orator alleges that if the said

city and its said officers proceed to enforce said ordinance by instituting suits day by day, as they now threaten to do, it will give rise to and occasion multiplicity of suits, and greatly vex, annoy, and harass your orator, and unduly interfere with it in the conduct of its lawful business.

And your orator further alleges that in pursuance of the threats so made as aforesaid, the said City of Parkersburg has, since the time last mentioned, sued out two further summonses or warrants against your orator for the recovery of wharfage dues under said ordinance, and suits are now pending against your orator upon the same. The attested copies of the said summonses or warrants which were served upon the president of your petitioner are herewith filed, marked Exhibits C & D, respectively, and prayed to be taken and read as part of this bill.

Your orator further alleges that since the 16th day of April, 1873, it has involuntarily and under protest paid to the said city of Parkersburg for wharfage charges under said ordinance the sum of two thousand one hundred and eighty $\frac{25}{100}$ dollars, which sum (if the said ordinance is null, void, and unconstitutional, as your orator is advised and charges it to be) they are entitled to recover back from said city; that your orator
20 has demanded from the mayor and council of said city the repayment of said sum, but they have refused to pay the same or any part thereof; said account which is made and certified to by R. H. Stoutenborough, clerk of the council of the city of Parkersburg, is herewith filed, marked Exhibit E, and prayed by your orator to be taken and read as part of this bill.

All which acts and doings on the part of said defendants are contrary to equity and good conscience, and tend to the manifest injury and oppression of your orator.

In tender consideration whereof, and forasmuch as your orator is remediles' in the premises at and by the strict rule of the common law, and can only be relieved in a court of equity, where matters of this kind are properly relievable and cognizable, your orator prays that the said City of Parkersburg, Thomas Murphy, recorder of said city, and George B. Neal, wharf-master thereof, may be made defendants to this bill; that your honor's most gracious writ of subpœna may issue, &c., and that the said defendants and each of them may be required to answer the same, and also the interrogatories appended to this bill; that the premises being considered, the said defendants and each of them, their attorneys, agents, and
21 servants, may be enjoined, restrained, and prohibited from all further proceedings against your orator and its office's under and by virtue of the ordinance aforesaid by the suits now pending, or otherwise from enforcing any judgement or judgements recovered by the said city of Parkersburg against your orator for the alleged violation of said ordinance or moneys claimed to be owing thereunder, and from in any way interfering with other rights of your orator to the free use of the Ohio River by means of its steamboats or otherwise; that your orator may have a final decree perpetuating said injunction, and for the recovery against the city of Parkersburg of the said sum of $2,180.25, which it has illegally exacted and collected from your orator for wharfage dues under said ordinance, and that said ordinance may be declared and adjudicated to be null and void.

And your orator prays for such other further and general relief as to a

court of equity may seem meet, and justice may require; and as in duty bound your orator will ever pray.

THE PARKERSBURG AND OHIO RIVER
TRANSPORTATION COMPANY,
By COUNSEL.

WALTER S. SANDS,
Sol. for Pl'ff.

Interrogatories to the above-named defendants.

22 1st. At what time or times was the public landing or wharf at the foot of Ann, Neal, and Kanawha streets, in the city of Parkersburg, constructed?

2d. How much money has the city of Parkersburg expended in the construction of said public landing or wharf?

3d. How much money has the city of Parkersburg expended for repairs on said public landing or wharf?

4th. How much money has the city of Parkersburg collected as wharfage charges for use of said public landing or wharf since the time of the construction thereof?

5th. What disposition has been made by said city of the moneys so collected by it, for such wharfage charges, and under what authority, by law or regulation of the council of said city?

The defendants, and each of them, are required to answer the interrogatories above numbered, respectively, 1, 2, 3, 4, and 5.

[SEAL.] THE PARKERSBURG AND OHIO RIVER
TRANSPORTATION COMPANY,
By COUNSEL.

UNITED STATES OF AMERICA,
District of West Virginia:

E. P. Chancellor, being duly sworn, deposes and says that he is the president of the Parkersburg and Ohio River Transportation Com-
23 pany, the plaintiff named in the foregoing bill, that he has read said bill and knows the contents thereof, and that the facts and allegations therein contained, as far as they are stated on the knowledge of the plaintiff, are true, and that so far as they are stated upon information he believes them to be true.

E. P. CHANCELLOR.

Taken and subscribed and sworn to before me this 31st day of August, 1878.

BARNA POWELL,
U. S. Commissioner, Dist. of W. Va.

The exhibits referred to in the foregoing bill are in words and figures as follows, to wit:

EXHIBIT A.

An ordinance amendatory of an ordinance passed 18th March, 1857, regulating the wharf's of the city, and establishing the rates of wharfage.

Be it ordained by the mayor and council of the city of Parkersburg,

that from and after the passage of this ordinance that every steamboat, keelboat, barge, flatboat, and flat (except ferry-boat) that may discharge or receive freight, or land on or anchor at or in front of any public
24 landing or wharf belonging to or which may hereafter become the property of the said city, or at which the said city may lawfully charge and receive wharfage for the purpose of discharging or receiving freight shall pay the said city for wharfage the following sums or rates for each, respectively, to wit:

On steamboats of less than 100 tons burden, the sum of three dollars for the first twenty-four hours or any part thereof, and the further sum of one dollar and fifty cents for every subsequent twenty-four hours or any part thereof.

On steamboats of 100 tons and less than 150 tons, the sum of three dollars and seventy-five cents for the first twenty-four hours or any part thereof, and the further sum of two dollars for every subsequent twenty-four hours or any part thereof.

On steamboats of 150 tons and less than 200 tons, the sum of four dollars and fifty cents for the first twenty-four hours or any part thereof, and the further sum of two dollars and twenty-five cents for every subsequent twenty-four hours or any part thereof.

On steamboats of 200 tons and less than 250 tons, the sum of five dollars and twenty-five cents for the first twenty-four hours or any part thereof, and the sum of two dollars and seventy-five cents for every subsequent twenty-four hours or any part thereof.

25 On steamboats of 250 tons and upwards, the sum of six dollars for the first twenty-four hours or any part thereof, and the further sum of three dollars for every subsequent twenty-four hours or any part thereof.

On each and every keelboat, flatboat, or barge, the sum of one dollar and fifty cents for the first twenty-four hours or any part thereof, and the further sum of seventy-five cents for every subsequent twenty-four hours or any part thereof; and on every flat the sum of fifty cents for each twenty-four hours or any part thereof.

Provided, That if any such steamboat shall not discharge or receive freight in the aggregate exceeding one ton, the wharfage shall be for all steamboats one dollar and fifty-cents; and if such boat shall receive and discharge in the aggregate more than one ton, and not exceeding ten tons, then the wharfage shall be three dollars for all such boats; and provided, also, that if such flatboat, barge, or keelboat shall not receive or discharge in the aggregate more than five tons, then the wharfage shall be seventy-five cents; and in all other cases the wharfage shall be according to the rates hereinbefore established.

If any person commanding or having charge of such boat shall neglect or refuse to make payment of wharfage as aforesaid, on demand
26 being made as aforesaid, it shall be the duty of the said wharf-master immediately to bring such person before the recorder or any justice of the peace for Wood County, in the name of the mayor and council of the city of Parkersburg, against such person refusing as aforesaid, and recover the amount of wharfage due for the first twenty-four hours, or any part thereof; and on refusal to pay the wharfage due after the first twenty-four hours, he shall institute the like proceedings and recover from

day to day the amount of wharfage which shall become due, and if the wharf-master shall by negligence fail to recover any wharfage that might have been collected by due diligence, he shall be chargeable therewith.

Exhibit B is in words and figures as follows, to wit:

STATE OF WEST VIRGINIA,
County of Wood, the City of Parkersburg, to wit:

To the sergeant or any policeman of said city:

You are hereby commanded in the name of the said city and State to summon the Parkersburg and Ohio River Transportation Company to appear before me, Thomas Murphy, recorder of said city, at my office, in said city, on the 22d day of August, 1878, at 10 o'clock a. m., to answer the complaint of the City of Parkersburg, upon a claim for the recov-
27 ery of money, for a sum not exceeding $100, exclusive of interest, to wit, for the sum of $9.00, which said city claims for wharfage charges due unto it from said defendant, and on account of which said city will demand judgment for the said sum of $9.00, with interest and costs according to law, and pursuant to the ordinances of said city, in such cases made and provided.

Given under my hand and seal this 21st day of August, 1878.

THOMAS MURPHY, [SEAL.]
Recorder.

A true copy. Teste:

THOS. MURPHY, *Recorder.*

Exhibit C is in words and figures following, to wit:

STATE OF WEST VIRGINIA,
County of Wood, the City of Parkersburg, to wit:

To the sergeant or any policeman of said city:

You are hereby commanded in the name of the said city and State to summon the Parkersburg and Ohio River Transportation Company to appear before me, Thomas Murphy, recorder of said city, at my office, in said city, on the 9th day of September, 1878, at 10 o'clock a. m., to answer the complaint of the City of Parkersburg, upon a claim for the recovery of money for a sum not exceeding $100, exclusive of interest,
28 to wit, for the sum of $4.00, which said city claims for wharfage charges due unto it from said defendant, and on account of which said city will demand judgment for the sum of $4.00, with interest and costs according to law, and pursuant to the ordinances of said city, in such cases made and provided.

Given under my hand and seal this 29th day of August, 1878.

THOS. MURPHY, *Recorder.* [SEAL.]

E'hibit E is an itemized account of wharfage collected off the Parkersburg and Ohio River Transportation Company, amounting to $2,180.25, and certified to as follows, to wit:

I hereby certify that the foregoing is a correct account of wharfage charges paid by the Parkersburg and Ohio Transportation Company to the City of Parkersburg, as taken from the wharfage books of said city.

R. H. STOUTENBOROUGH, *Clerk.*

At a circuit court of the United States for the district of West Virginia, continued and held at Parkersburg, in said district, on the 27th day of September, 1878—present, the honorable John J. Jackson, judge of the district court of the United States for the district of West
29 Virginia, and as such associate justice of the circuit court of the United for said district, the following order was made, to wit:

THE PARKERSBURG AND OHIO RIVER TRANSportation Company
vs.
THE CITY OF PARKERSBURG ET AL. } In equity.

The defendants this day tendered their joint and several demurrers in writing to the bill in this cause, in which demurrer the plaintiff joins, and the same is set down for argument to be had on the 11th day of December, 1878; and for reasons appearing to the court the temporary injunction awarded in this cause on the 31st day of August, 1878, is continued in force until the further order of this court, but leave is given to the defendant, upon notice to the plaintiff, to apply to the court for an order requiring the plaintiff to give bond in sufficient penalty and with good security, as a condition of the continuance of said injunction.

The joint and several demurrer above referred to is in the words and figures following, to wit:

In the circuit court of the United States for the district of West Virginia.

THE PARKERSBURG AND OHIO RIVER TRANSportation Company, a corporation duly
30 organized and doing *and doing* business under the laws of the State of West Virginia, complainants,
vs.
THE CITY OF PARKERSBURG, A MUNICIPAL corporation, created and doing business under the laws of the State of West Virginia, Thomas Murphy, recorder of said city of Parkersburg, and George B. Neal, wharfmaster of said city, all citizens of the State of West Virginia, defendants. } In equity.

The joint and several demurer of the said The City of Parkersburg, Thomas Murphy, and George B. Neal, defendants to the bill of complaint of said The Parkersburg and Ohio River Transportation Company, complainant.

These defendants, respectiv'ly, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true, in such manner and form as the same are therein and thereby set forth and alleged, do demur thereto, and for cause of demurrer show that the complainant hath not by its said bill made such a case as entitles

it, in a court of equity, to any discovery or relief from or against this defendant touching the matters contained in the said bill, or any such matters; and for further cause of demurrer these defendants shew that
31 in case the allegations in the said bill contained were true, as therein set forth, which they do not admit, the said bill contains not any matter of equity whereon to sustain such writ of injunction as is sought and prayed for in and by said bill, nor has complainant made such a case as entitles it to anything at the hands of this court.

Wherefore and for divers other good causes of demurrer appearing in the said bill of complaint, these defendants do demur to the said bill, and to all the matters and things therein contained, and humbly pray the judgement of this honorable court, w'ether they shall be compelled to make any further or other answer to the said bill, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

I certify that, in my opinion, the foregoing demurrer of The City of Parkersburg, Thomas Murphy, and George B. Neal, defendants to the bill of complaint of The Parkersburg and Ohio River Transportation , is well founded in law, and proper to be filed in the above cause.

B. M. AMBLER,
Solicitor and Counsel for Defendants.

UNITED STATES OF AMERICA,
District of West Virginia, ss:

C. B. Smith, being duly sworn, does depose and say that he is mayor of the defendant The City of Parkersburg; that he has read the
32 foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceeding therein.

CHAS. B. SMITH, *Mayor.*

Sworn to and subscribed to before me, this 21st day of September, 1878.
W. W. VAN WINKLE,
U. S. Commissioner, District of West Va.

And on another day, to wit, on the 20th day of February, 1879, the following order was made, to wit:

THE PARKERSBURG AND OHIO RIVER TRANSportation Company,
vs.
THE CITY OF PARKERSBURG, THOMAS MURPHY, recorder of said city, and George B. Neal, wharfmaster of said city. } In equity.

Upon motion of defendants, by counsel, and for reasons appearing to the court, it is ordered that the decree entered in this cause on yesterday be, and the same is hereby, set aside. And thereupon the demurrer of the defendant to complainants' bill, being argued by counsel, the court is of opinion that the said demurrer is well taken; and it is therefore or-
33 dered, adjudged, and decreed by the court that the injunction prayed for be refused; that said demurrer be sustained, and that the com-

plainants' bill be dismissed. And it is further ordered that the complainants pay to the defendant their costs in this suit expended.

And on another day, to wit, on the 6th day of March, 1879, the following order was made, to wit:

THE PARKERSBURG AND OHIO RIVER TRANSportation Company, a corporation duly organized and doing business under the laws of the State of West Virginia, and a citizen of that State,
vs.
THE CITY OF PARKERSBURG, THOMAS MURPHY, recorder of said city of Parkersburg, and George B. Neal, wharfmaster of said city.
} In equity.

The plaintiff, The Parkersburg and Ohio River Transportation Company, conceiving itself aggrieved by the decree made and entered in this cause, on the 20th day of February, 1879, doth hereby ask the court for a writ of error thereupon to the Supreme Court of the United States, and prays that a writ of error to operate as a supercedeas may be allowed, and a transcript of the record and proceedings in this cause, duly
34 authenticated, may be sent to the Supreme Court of the United States, and if bond in the penalty of ($3,500.00) three thousand five hundred dollars, conditioned as the law directs, is filed in thirty days from this date by said plaintiff, The Parkersburg and Ohio River Transportation Company, which said bond is to be approved by the clerk of this court, it is ordered that said writ of error to operate as a supersedeas be allowed, and that the clerk of this court do send an authenticated copy of the record and proceedings in this cause to the Supreme Court of the United States, so that the same be there on or before the first day of the next term thereof.

A bond in accordance with the foregoing order, approved by the clerk of this court, was filed in the clerk's office of this court on the 7th day of March, 1879, and is in the words and figures following, to wit:

Circuit court of the United States for the district of West Virginia.

THE PARKERSBURG AND OHIO RIVER TRANSportation Company, a corporation duly organized and doing business under the laws of the State of West Virginia, and a citizen of that State,
vs.
THE CITY OF PARKERSBURG, THOMAS MURphy, recorder of said city of Parkersburg, and George B. Neal, wharfmaster of said city.
} In equity.

35 Know all men by these presents that we, The Parkersburg and Ohio River Transportation Company and James N. Williamson and Joseph Good, are held and firmly bound unto the City of Parkersburg, Thomas Murphy, recorder of said city of Parkersburg, and George B. Neal, wharfmaster of said city, in the sum of three thousand five hundred dollars, to be paid to the said city of Parkersburg, Thomas Murphy, recorder of said city of Parkersburg, and George B. Neal, wharfmaster of said city,

to which payment, well and truly to be made, we bind ourselves and each of us, jointly and several'y, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 7th day of March, 1879.

Whereas the above-named Parkersburg and Ohio River Transportation Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgement rendered in the above suit by the circuit court of the United States for the district of West Virginia in favor of the above-named defendant:

Now, therefore, the condition of this obligation is such that if the above-named Parkersburg and Ohio River Transportation Company shall prosecute its said writ of error to effect, and answer all damages and costs sustained by the city from the time of and by reason of sueing out said
36 injunction, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

{ SEAL OF P. & O. R. T. CO. } PARKERSBURG & OHIO RIVER TRANSP. CO.
By E. P. CHANCELLOR, *Pres.*
J. N. WILLIAMSON. [SEAL.]
JOSEPH GOOD. [SEAL.]

Subscribed and acknowledged before and approved by me this 7th day of March, 1879.

L. B. DELLICKER,
Clerk C. C. U. S., D. of W. Va.

Approved.

J. J. JACKSON,
Judge D. C't W. Va.

MARCH 7TH, 1879.

UNITED STATES OF AMERICA,
District of West Virginia, ss:

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do certify that *that* the foregoing is a true transcript from the records of my office in the case of The Parkersb'g and Ohio River Transportation Company vs. The City of Parkersb'g, Thomas Murphy, recorder of said city of Parkersb'g, and George B. Neal, wharfmaster of said city.

In testimony whereof I hereunto set my hand and the seal of said court, at Parkersb'g, in said district, this 15th day of March, 1879.

[SEAL.]

L. B. DELLICKER,
Clerk C. C. U. S., D. of W. Va.

37 (Indorsed:) Circuit court of United States, district of West Virginia. 5,487. The Parkersb'g & Ohio River Transportation Company vs. The City of Parkersb'g et al. Transcript of record.

Appeal allowed Nov. 21, 1879.

M. R. WAITE, *Ch. J.*

C. W. Moulton, counsel for appellant.

(Indorsement on cover:) No. 172. The Parkersburg and Ohio River Transportation Company, appellant, *vs.* The City of Parkersburg, Thomas Murphy, recorder, and George B. Neal, wharfmaster. West Virginia, C. C. U. S. Filed 29 January, 1880.

17-691

OFFICE SUPREME COURT U. S.
FILED
JAN 18 1883
JAMES H. McKENNEY, Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 172.

THE PARKERSBURG AND OHIO RIVER TRANSPORTATION COMPANY, APPELLANTS,

vs.

THE CITY OF PARKERSBURG, THOS. MURPHY, RECORDER, AND GEORGE B. NEAL, WHARFMASTER OF SAID CITY, RESPONDENTS.

Appeal from Circuit Court of United States for West Virginia.

BRIEF FOR APPELLANTS.

C. W. MOULTON
AND
EWING & SOUTHARD,
Of Counsel for Appellants.

WASHINGTON:
1883.

Supreme Court of United States.

APPEAL FROM CIRCUIT COURT OF UNITED STATES FOR WEST VIRGINIA.

IN EQUITY.

OCTOBER TERM, 1882.

No. 172.

THE PARKERSBURG AND OHIO RIVER TRANSPORTATION COMPANY,
Complainants, Appellants.

vs.

THE CITY OF PARKERSBURG, THOS. MURPHY, Recorder, and GEORGE B. NEAL, Wharfmaster of said City,
Respondents.

BRIEF FOR COMPLIANANT.

Statement of the Case.

The bill alleges:

First.—That the complainant is a corporation organized, existing and doing business under the laws of the State of West Virginia, having its principal office at the City of Parkersburg, Wood County, in said State; that

it owns and controls several steamboats licensed to do a coasting trade on the waters of the Ohio river, under the laws of the United States; and that the complainant, by means of its said steamboats, has been and is engaged in interstate commerce on said river.

Second.—That the defendant, the City of Parkersburg, is a municipal corporation, under the laws of the State; that the said city has constructed a wharf or public landing at the termini of its streets, on the river, and, under the ordinance referred to, charges wharfage upon all steamboats, including those of complainant. The ordinance provides, among other things, that every steamboat, etc., "that may discharge or receive freight, or land or anchor at, or *in front* of any public landing or wharf" of the city, shall pay the said city certain sums which are to be ascertained and graduated by the "tons burden" of the steamboats.

That the complainant having of late refused to pay to the city any further charges under said ordinance, the city has instituted suits for the recovery of the same; that daily suits of like character are threatened, to the annoyance and injury of complainant.

The bill therefore prays that an injunction may issue to restrain the further enforcement of said ordinance; that the same may be decreed to be invalid, and that the complainant may recover back from the city the said sum of $2,180 exacted under it.

There is a general demurrer by all the defendants to the bill. The case was submitted to the Circuit Court on the pleadings, and the Court gave judgment for defendants and dismissed the bill, and from that decision plaintiff appeals to this Court.

The substance of the contention on the part of the complainant is, that the City of Parkersburg has levied charges upon their river steamboats, their tonnage and cargoes, disguised under the name of wharfage, but which is in fact a tax upon commerce for the purpose of raising money to defray its own obligations.

That the city under said ordinance has collected wharfage dues sufficient in amount to pay over and over again the cost of the construction and maintenance of said wharf, and that the ordinance is oppressive and unjust and in violation of the Constitution and the Act of Congress.

That complainant has paid to the city under said ordinance $2,180 under protest, in order to avoid the arrest of its officers and other annoyances incident to the enforcement thereof.

Assignment of Errors.

Appellant claims there is error in the proceedings, judgment and decree of the Court below in refusing the injunction, in sustaining the demurrer of defendants to complainant's bill, and in dismissing said bill with costs, because in and by the allegations of said bill it is made to sufficiently appear:

(*a*). That the charges imposed by the ordinance of said city are unreasonable, excessive and oppressive.

(*b*). That the said ordinance is unconstitutional and void, for the reason that it provides for charges which cannot be treated as a compensation for the use of the wharves.

(*c*). That the payments by complainant were illegal exactions and were made under protest, and might rightfully be recovered back.

(*d*). That further collections were threatened and attempted by actions against complainant, to be made under the said illegal and void ordinance.

(*e*). That good causes of action were set forth in said bill in favor of complainant and against the defendants.

Argument.

We maintain the following propositions:

1. While the City of Parkersburg may lawfully provide for the erection of wharves and for reasonable charges for their use, she cannot, under the guise of such lawful power, establish and exact rates which are excessive and extortionate.

2. The ordinance in question is in conflict with the Federal constitution and void, for the reason that its language covers the anchoring of all vessels anywhere "*in front* of any public landing or wharf" of said city.

3. That such illegal or excessive charges, when paid under protest, may be recovered back, and their further assessment and collection may be enjoined.

I.

The power of the city authorities to assess reasonable charges for wharfage is not denied. The *proper* exercise of that power is not a tax upon commerce, but tends to promote it. We contend, however,

that the allegations of the bill in this case show that the city authorities have abused the powers entrusted to them. That under the guise of making regulations for the convenience of steamboats, they have imposed a serious tax upon their operations.

Whether or not the imposition complained of is a *bona fide* wharfage regulation, to facilitate the business of steamboats, or is intended as a tonnage tax independent of any services rendered to steamboats upon their commerce, is to be determined by the surrounding facts. It ought not to be upheld if it is such a tax.

The bill shows that the amount collected and disbursed, connected with the wharfage business, was as follows:

In 1876—

$2,744.37 collected.
$49.72 for repairs.
$412.65 to wharfmaster.

In 1877—

$2,915.13 collected.
$366.53 paid to wharfmaster.
$29.59 paid for repairs.

These figures create the impression that the city authorities in levying such rates had other objects in view than that of maintaining wharves for the convenience of steamboats.

If we examine the facts as to the *application* of the funds thus raised, we shall find that this impression is confirmed.

The ordinance complained of was passed in 1857 and amended in 1865, since which period there has been no modification of the hardships it imposed upon steamboats (Record, pp. 9, 10).

It is a significant fact that this ordinance is found necessary very soon after the town (now city) of Parkersburg had subscribed to the stock of the Northwest Virginia Railroad Company. By that ordinance the "net proceeds of wharfage rates, after paying for repairs, management and improvement" are to be paid over to the trustees of the loan made for said subscription by said town (Id., p. 6). This is in *terms* an appropriation of the money assessed upon steamboats for the purpose of building a railroad. The *form* of this transaction is not important. The facts are too palpable to be concealed under any form of words.

We appeal to the Court to be relieved from this oppression. The Court has had occasion to consider cases somewhat similar to this, but it is believed that it has not before appeared that the tax imposed upon steamboats has been used for the purpose of constructing railroads.

We are aware that the necessity for large wharfage assessments becomes urgent and pressing soon after these river towns subscribe money to aid in building railroads.

While the amount collected over and above the expense of maintaining the wharf is not a conclusive presumption against the validity of the ordinance, yet it is very persuasive that something besides the maintenance of the wharf was intended by the city authorities.

It is difficult to perceive how the burdens imposed upon steamboats by this ordinance can be upheld as legitimate use of the power for the purposes of collecting wharfage merely. It cost for two years to maintain the wharves, including salary of wharfmaster, $858.49, while the amount collected under the name of

wharfage was something over $5,659.50, and the repairs of the wharves was only $79.31.

This disproportion indicates a desire to increase the city's revenues rather than to facilitate the commerce of steamboats.

The attention of the Court is also invited to the fact that the ordinance mentioned in the bill directs two methods of assessment, one of which relates to the capacity of the steamboat and the time it shall remain in port, while the other is a proviso directing the collection of wharfage on freight without reference to the capacity of the boat or the time it shall remain in port. It is that portion of the ordinance which directs an assessment on the capacity of the boat and the time of its remaining in port which we specially complain of, and particularly in relation to large boats anchoring in front of the wharves.

This is no idle complaint on our part. The charges for wharfage imposed by the ordinance in this case would, in many instances, amount to more than the transportation charged.

It is to be borne in mind that the distances between these river towns is so short that steamboats usually land at several of them every day. These landings are frequently made for the accommodation of the public, and at times when no freight whatever is received.

II.

A tax upon commerce is prohibited to the States, but by this ordinance it is sought to accomplish by indirection what could not be directly done.

A reference to it shows a distinction between its terms and those contained in the ordinance in the case of Packet Company *v.* Catlettsburg (105 U. S. R., p. 559). The substance of the enactment in that case was, that it imposed wharfage on all "steamboats and other water craft *landing at* the public landing of Catlettsburg." And although boats were required to land at the designated wharf, the wharfmaster was authorized to permit landings at other places. In the case at bar every steamboat etc., that lands or anchors at *or in front* of any public landing or wharf belonging to or which may become the property of the said city, shall pay the said city for wharfage, the following sums or rates * * * (Record, pp. 9 and 10).

It is to be observed that these charges are imposed on every description of water craft (except ferries), that receive or discharge freight or that land or anchor either at the wharf *or in front* of it, or that shall stop for the purpose of receiving or discharging freight, whether they actually receive or discharge any freight or not. So that the charges are assessed whether the wharves are actually used or not, provided the water craft comes to anchor in front of them. This seems to us to be an act of sovereignty rather than the exercise of a proprietary right, and a tax upon water craft for entering and departing from said city without any reference to the actual use of its wharves. No proviso is made for the consent of the wharfmaster to waive the collection of the wharfage as in the Catlettsburg case. The ordinance is in the form of a statutory command which may not be dispensed with by any executive authority.

Under the foregoing regulations, it is easy to see that a steamboat may be taxed if it anchors or stops anywhere in the channel of the river if it does

so in *front* of one of the city's wharves, whether it receives or discharges freight or not. In the fluctuating stages of water in the Ohio river, a steamboat might be detained in front of one of these wharves for an indefinite time, and an assessment upon it in accordance with the terms of this ordinance would be onerous and oppressive, if not ruinous.

We believe the terms of this ordinance to be within the definition of a tax upon commerce, as given by this Court in Cannon *v.* New Orleans (20 Wall, p. 577). Mr. Justice Miller, in the opinion in that case says (p. 581):

"Whatever more general or limited view may be entertained of the true meaning of this clause, it is perfectly clear that a duty or tax or burden imposed under the authority of the State, which is by the law imposing it to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving at and departing from a port of the United States, is within the prohibition."

We believe also that the definition in the case of Packet Company *v.* Keokuk (95 U. S. R., p. 80), favors a similar view. Inasmuch as the ordinance here complained of imposes a burden upon steamboats, whether the *wharves are used by them or not*, we submit that it is a *tax* within the definitions therein given by this Court.

The construction of the terms of an ordinance similar to the one at bar occurred in the United States Circuit Court for the District of Minnesota (Packet Company *v.* the City of St. Paul, 3 Dillon, p. 454). In that case the ordinance was:

"That every steamboat or other vessel which may land or anchor at or *in front* of any landing, wharf or pier within the limits of the City of St. Paul," etc. (Id., p. 454).

In that case the Court held that the ordinance was in violation of the Constitution of the United States, inasmuch as it amounted to an assessment for arriving at and departing from a town, without reference to the use of the wharves. This is a case in point.

The principle of this decision is confirmed by this Court in Packet Co. *v.* Catlettsburg, *supra.*

We believe that the allegations of this bill bring the case within the suggestions in the decision of the last-mentioned case.

We beg leave to invite the consideration of the Court to the fact that the owners of steamboats on the western rivers are already severely burdened by the restrictions which Congress has found it necessary to impose upon their traffic. If to these burdens there is to be added such impositions as may occur to municipal authorities, the entire trade on the river is in danger of being absorbed by their powerful competitors, the railroads.

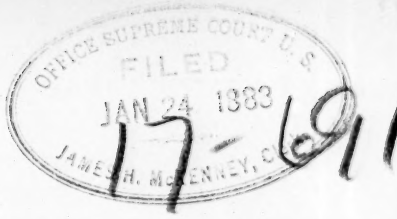
We submit that the decisions of this Court sufficiently distinguish this case from Packet Co. *v.* Keokuk and Packet Co. *v.* Catlettsburg, *supra,* in which the city ordinances were upheld.

III.

The illegality or unreasonableness of such charges is open to judicial inquiry and determination, and when found to be illegal or excessive and to have been paid under protest, they may be recovered back.

Tonnage Tax Cases, 12 Wall, 209.
Packet Co. *v.* St. Paul, 3 Dillon, 454.

C. W. Moulton
&
Ewing & Southard,
Counsel for Appellants.



17-691

IN THE

Supreme Court of the U. S.

OCTOBER TERM, 1882.

THE PARKERSBURG AND OHIO RIVER TRANSPORTATION COMPANY,

vs.

THE CITY OF PARKERSBURG, ET AL.

No. 172.

Appeal from the Circuit Court of the United States for the District of West Virginia.

W. A. COOK,
C. C. COLE,
Attorneys for Appellee.

IN THE

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No. 172.

Appeal from the Circuit Court of the United States for the District of West Virginia.

The bill was dismissed on demurrer. There was no error in this.

The section of the charter of the city authorizing it to construct wharves and charge wharfage, was enacted in 1842, and is as follows:

"§ 6. *Be it further enacted*, That it shall be lawful for the President, Recorder and Trustees of the town of Parkersburg to establish and construct wharves, landings and docks on any street and alley, or on any ground which does now belong, or which may hereafter belong to the said town, or which may be condemned in due course of law for such purpose, and to repair, alter or remove any wharf, dock or landing at the mouth of any street, or any other ground in the said town to which the said town, or the Trustees thereof, may have been, or may

hereafter be authorized by individual conveyance, or any other manner, to use for landing, wharfing or dock purpose, and to establish and collect rates and taxes for using in any manner the said landings, wharves or docks; and they shall further have authority to pass and enforce such by-laws, rules and regulations as shall be proper to keep not only those hereby authorized, but all other public landing, wharfs and docks of said town, in proper order and repair, and to preserve peace and good order at the same, and to regulate the manner in which the same shall be used by any ferry and other boats or vessels whatsoever"

See Act of Legislature of Virginia, 1842, Ch. 193, Sec. 6.

This was re-enacted in the act to reduce into one the several acts relating to the Town of Parkersburg, passed March 17th, 1860, in the following language:

"§26. The council shall have authority to establish and construct landings, wharves, and docks, and to repair, alter, or remove any landing, wharf or dock which has been or shall be so constructed; and to establish and collect rates and taxes for using in any manner the landings, wharves and docks belonging to said town. And they shall further have authority to pass and enforce such ordinances as shall be proper to keep the same in proper order and repair, to preserve peace and good order at the same, and to regulate the manner in which they shall be used."

See acts of Leg. of Va., 1860; Ch. 200, Sec. 26.

FIRST.

These acts and the ordinance of the City of Parkersburg passed in pursuance thereof, are not in conflict with the Constitution or any law of the United States, and are therefore valid.

Packet Co., v. Catlettsburg, 105 U. S. 559;

Packet Co., v, Keokuk, 95 U. S. 80;

Packet Co., v. St. Louis, 100 U. S. 423.

Every question raised in the case at bar is decided favorably to the appellant in the cases above cited.

SECOND.

Both parties to the suit being residents of the State of W. Va , the court below had not, nor has this court, any jurisdiction to decide any but the Federal question stated in the first point of this brief. The question of the unreasonableness of the rates even if properly presented by the bill is not one of which the court below, or this court could take jurisdiction in this case.

THIRD.

If there were any just ground of complaint on account of unreasonableness of charges, it would seem that the remedy is at law and not in equity.

Packet Co., v. Catlettsburg, a *Supra*;

High on injunc. §97 and following.

W. A. COOK,
C. C. COLE,
Attorneys for Appellee.